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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. FORECLOSURE CONNECTION, INC. and JASON WILLIAMS, Defendants.	))))))	**DEFENDANTS' CLOSING ARGUMENTS, PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW** Case No. 2:15cv00653 Judge Dale A. Kimball

DEFENDANTS' CLOSING ARGUMENT

FIRST CAUSE OF ACTION

Plaintiff, Thomas E. Perez, Secretary of Labor, U.S. Department of Labor (the "Secretary") filed his Complaint in this action on September 11, 2015. Secretary's First Cause of Action is for Defendant's, Foreclosure Connection, Inc. and Jason Williams (collectively "FCI" and individually as "Williams" or "Foreclosure Connection") alleged obstruction of the

Secretary's investigation into possible violations of the Fair Labor Standards Act ("FLSA").

For his first cause of action it was incumbent upon the Secretary to prove by a preponderance of the evidence that FCI following the stipulated to Preliminary Injunction Order, violated the Order itself and that the FCI failed to cooperate in the Secretary's investigation.

The Secretary in conjunction with the filing of his Complaint, filed Notice and Motion for Temporary Restraining Order and Order for Defendants to Show Cause Why a Preliminary Injunction Should Not Issue. The Motion for TRO was supported by a Declaration made by the Secretary's investigator, Sheffield Keith, whereby he set forth a list of several items tending to demonstrate obstruction actions taken by FCI. Not all, but many of the listed items set forth in the Declaration, FCI admitted to and as a result FCI stipulated to the entry of the Preliminary Injunction Order and indicated its willingness to cooperate in the Secretary's investigation. Since the entry of the stipulated Preliminary Injunction Order, FCI contends that it has complied with the Order. The Secretary on the other hand, at Trial argued that FCI did not comply with the Order as FCI did not report to the Secretary that it had terminated the employment of Exequiel Magana, which the Order required the reporting to the Secretary of any termination of any worker pending the Secretary's investigation. The Secretary also argued that Mr. Magana's termination was a retaliation for his informing Williams that he was the person who taped a meeting held between Williams and several of FCI workers on July 15, 2015. This tape was obtained by the Secretary and played during this Trial. The Secretary called Mr. Magana as a witness in this matter. At no point in his testimony did he claim that he was terminated and for that matter terminated because he admitted to taping the meeting. In fact, he testified that at the meeting with Williams where he divulged his taping, Mr. Magana requested a favor of being able to take 3 weeks off so that he could work for an FCI competitor that was paying him more per hour for this three-week work stint. The favor was granted and upon returning to work in June 2016, he was offered an increase in his hourly rate of approximately 50% increase. These are not facts demonstrating "retaliation." The increase was contingent upon his signing an Independent Contractor Agreement. Magana received the increase in pay for a couple of months, even though he had not signed the agreement. When asked again to sign the agreement in a meeting with Williams and David Garcia at FCI offices, he said he did not want to and was notified that his hourly rate would revert to his prior hourly rate before the increase. The meeting ended and Magana left FCI offices. According to the testimony of Magana and Williams there was no statement that Magana was terminated and as such there was no requirement under the Order for FCI to notify the Secretary that Magana quit.

It is important to keep in mind that a preliminary injunction is presently in place pending the investigation of the Secretary. That the injunction has been complied with and there has been no other showing for a need for an additional permanent injunction.

The Secretary did not prove by a preponderance of the evidence that FCI violated the Preliminary Injunction Order or failed and continued to fail in cooperating with the Secretary's investigation. Defendants respectfully submit that no basis for the entering a permanent injunction against FCI exists. An injunction is not for punishing for past violations, but to enjoin a party or parties from current and/or future violations.

SECOND CAUSE OF ACTION

The Secretary claims that FCI committed retaliation against its employees, including two who were terminated on the belief that they made complaints to the Utah Labor Commission. As for the other employees, FCI allegedly instructed these employees to fabricate tax documents, directing employees not to speak with the Wage and Hour Investigators and threatening employees to sign false independent contractor agreements and to lie to the investigators or face reprisal. The Court heard a tape recording of a meeting held by Williams at a work site on July 15, 2015. Present at the meeting were Jack Erickson, Exequiel Magana, Gary Troy Dentor, Justin Malin and Antonio Villa [see Uncontroverted Facts No. 16]. At the July 15 meeting Williams expressed his desire that the workers not speak to the investigators, informed the workers FCI would no longer provide pay stubs and asked the workers to sign subcontractor agreements [see Uncontroverted Facts Nos. 17, 18 & 19]. The Secretary called as witnesses to the July 15 meeting Jack Erickson and Exequiel Magana and cross-examined Williams as to the July 15 meeting. Both Erickson and Magana testified that they did not fear any reprisal and do not recall anything to do with a subcontractor agreement. FCI admitted to impeding the investigation early on and thereafter stipulated to a preliminary injunction and agreed to cooperate with the investigators. Excluding the issue of the Secretary's claim of retaliation against the Barber's, there was no evidence demonstrating that there was any retaliation against the other workers.

THIRD CAUSE OF ACTION

The Secretary claims that FCI retaliated against Mychal Barber and Mychal Barber's son, Mychal Scott Barber (the "Barbers") by refusing to permit them to work for FCI allegedly after FCI learned that the Barber's filed a claim against FCI with the Utah Labor Commission and/or the Secretary.

To begin with, FCI asserts that the Barbers were not employees of FCI. To be covered under Section 15 of the FLSA, the Barbers must be employees of FCI. Aside from the self-serving claims of the Barber's that they were employees of FCI, there is little support for this in the evidence presented to the Court. Mychal Scott Barber had performed the same type of work for his dad, a Utah licensed general contractor, in the past on several occasions, and each time not being employed by the person that hired Mychal Barber to perform as a general contractor. The evidence is clear that FCI did not hire Mychal Scott Barber, in fact Williams never spoke with him until his deposition in this case. That FCI never directed or supervised his work. This was the testimony not only of Williams, Jack Erickson, David Garcia, but for the most part the Secretary's own investigator, Sheffield Keith, it was Mychal Barber who directed his son's work activity. As per the testimony of Mychal Barber, Williams, Jack Erickson, David Garcia and Brandon Gilleland they all said that FCI had plenty of work and projects. FCI needed another general contractor besides Jack Erickson and such need was fulfilled by the engaging Mychal Barber, a general contractor. He was assigned work requiring a general contractor's license and although Mychal Barber claimed he was performing this work under Jack Erickson's general contractor's license, Jack Erickson vehemently denied this claim. There was evidence that Mychal Barber and Jack Erickson seldom worked at the same work site and no witness or other evidence was presented to corroborate Mychal Barber's self-serving claim. Mychal Barber maintained and used his own tools, except on one occasion where he used FCI's hand-held manual cement cutter. Mychal Barber has his own construction company and for years has performed similar type construction work for others as an independent contractor. The Barbers were not employees of FCI.

FCI did not retaliate against Mychal Barber because he filed a complaint with the Secretary. (The Barber's testified that they did go to the Utah Labor Commission, but no complaint was filed. The Barber's were directed by a receptionist to go to the Secretary. As for Mychal Scott Barber, he was treated as being employed by his dad and therefore there was no communication with him about being terminated or told not to show up for work by FCI for any reason). It is important to note that Mychal Barber was never "fired." Mychal Barber in an interview with Sheffield Keith, informed Keith that he was simply not invited back to work. The stipulated facts set forth that during the afternoon of July 7, 2015 the Barber's filed their complaints with the Secretary. On July 8, 2015, Jack Erickson called Mychal Barber regarding his daily work and Erickson told him that he was not needed that day. That afternoon Sheffield Keith met with Williams at the FCI offices. Williams testified that this meeting with Keith was the first he knew of any complaint having been filed. As there was absolutely no evidence to demonstrate that somehow Williams learned of the complaints before Sheffield Keith appeared, Williams testimony on this fact is certainly creditable. Thus, at a minimum Mychal Barber was told to not show up for work before FCI could have known about the complaints. Williams, Jack Erickson, David Garcia and Brandon Gilleland all testified as to the reasons Jack Erickson told Mychal Barber on the morning of July 8, 2015 and the reasons had nothing to do with the complaints. For example, there was testimony from Williams and David Garcia that at the end of June 2015, Williams suspected that Mychal Barber likely had caused FCI properties to be "red tagged" and this concerned Williams. Williams in late June 2015 informed Mychal Barber that there was no more work for him. This action was consistent with Jack Erickson's taped conversation with the Barbers and consistent with actions taken by the Barbers following their being told no more work. Keeping in mind the testimony of Mychal Barber, Williams, David Garcia, Jack Erickson and Brandon Gilleland all stated that Mychal Barber was always informed where he would work and the work to be done. However, this changed after Mychal Barber was told there was no work. The Barbers submitted claims for working at one site for Monday, July 6 and another site for on Tuesday, July 7, 2015 for a total of 10 hours each day. Jack Erickson and Brandon Gilleland worked at the same site the Barber's claim they worked 10 hours at on July 6, 2015.

Jack Erickson was at this site all morning and testified that the Barbers were never present at this site. Brandon Gilleland worked at this site all day on July 6, 2015 and stated that the Barbers were never there. Exequiel Magana testified that the Barbers were at the second work site on July 7, 2015 for about 2 hours and then left and never returned. This was the day that they went to Salt Lake City to first the Utah Labor Commission and then to the Secretary's office to file their complaint. Jack Erickson also worked at the second worksite on July 7, 2015, but arrived after the Barbers had left and Erickson testified that the Barbers never returned to the site. Both Jack Erickson and Brandon Gilleland apprised Williams of the Barber's not being at the work site on July 6, 2015. Williams informed both Jack Erickson and Brandon

Gilleland that FCI did not have any work for the Barbers.

The Court can glean two facts from the foregoing. The testimony that was given, as to the reasons FCI chose to not assign any additional work to the Barbers, was based on the work stoppage caused by the "red tagging" of two FCI work sites that the Barbers had been working at. Williams believed that Mychal Barber was the cause for this. In late June 2015 Williams informed Barber that FCI did not have any more work for him. Following this notice from Williams that there was no more work for the Barbers, the Barbers apparently during the 4th of July holiday. The Barber's tiled a chimney at the FCI firehouse work site (according to the testimony of Jack Erickson, an experienced general contractor this represented about 4 hours of work for one man). On July 7, 2015 for about 2 hours at another FCI work site where Exequiel Magana was working. Thus, instead of working the claimed 20 hours after being let go, the Barbers only worked 4 hours each. In short, the two facts are that the Barbers were let go prior to any knowledge of the complaints being filed and that the Barbers lied about their hours worked after being let go.

The burden of proof was upon the Secretary to establish that the FCI testimony concerning why they did not assign any more work to Mychal Barber was pretextual. The Secretary played two tapes for the Court. One tape was between Jack Erickson and the Barbers and the other tape was between Williams and the Barbers. On the Erickson tape it was consistent with the desire not to have Mychal Barber back because of the "red tags." The Williams tape did not negate the basis for the desire to not use Mychal Barber. Basically, other than these two tapes, the Secretary did not present evidence to try to show the reason for the letting the Barbers go, this was pretextual and as the tapes did not establish the reasons were pretextual there is no basis to conclude Mychal Barber was let go because he filed a complaint with the Secretary.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The following facts are per stipulation of counsel and the Court hereby adopts such as its findings of fact:

1. Foreclosure Connection, Inc. ("FCI") is a Utah corporation in the business of acquiring properties in or near foreclosure status and renovating most of these properties for rental or resale. FCI also manages the rental properties.

2. The "renovation" activity described in the preceding paragraph depends upon the needs of the acquired property and may consist of anything from minor repair work (like installing new cabinet hardware, painting, or replacing a toilet) to general construction work (like demolition, roofing, or installation of drywall, flooring, cabinetry, or siding).

3. FCI worksites are the properties under renovation, and each worksite is identified by the address of the property.

4. Jason Williams is the manager of FCI. He and his business partners own a number of business entities, including but not limited to: FCI; MedPro, LC; Equity Savers, LLC; BPO Specialists, LLC, Castlerock Unlimited, LLC; Sun Equity, LLC; TriForce Group, LLC; Williams & Clark, LLC; Williams & Reynolds, LLC; Brothers Enterprise, LLC; October Way, LC; Cadyn, LC; Wilshire Place, LLC, and Godnick Investment, LC.

5. Through these business entities, Williams and his business partners own the properties managed by FCI.

6. FCI offices are located at 2226 West 5400 South, Taylorsville, Utah 84129.

7. In 2015, Mychal Barber and his son, Mychal Scott Barber (collectively, the "Barbers") performed renovation work on behalf of FCI. Mychal Barber began working for FCI on or about May 7, 2015. Mychal Scott Barber began working on FCI properties on or about June 4, 2015.

8. Mychal Barber and Mychal Scott Barber each received pay checks from FCI and its related business entities.

9. FCI did not pay the Barbers for the last 20 hours each claimed that they worked for FCI during the week ending July 9, 2015.

10. On or about the afternoon of July 7, 2015, the Barbers filed complaints against FCI with the U.S. Department of Labor, Wage and Hour Division ("WHD"), at WHD's Salt Lake City, Utah office. The Barbers alleged that FCI failed to pay overtime wages as required by the Fair Labor Standards Act ("FLSA").

11. On or about the morning of July 8, 2015, Jack Erickson ("Erickson") told Mychal Barber not to show up for work at FCI because there was not enough work for the Barbers to do.

12. Erickson has performed work for FCI since 2008.

13. On or about the afternoon of July 8, 2015, WHD Investigator Sheffield Keith, ("Keith") met with Williams at the FCI offices. During this initial meeting, Keith provided Williams with a Wage Hour Appointment Letter ("Appointment Letter").

14. This Appointment Letter provided information about WHD's investigation and identified eight (8) categories of documents for FCI to make available to Keith. Following the

meeting, Williams provided to Keith, via email dated July 8, 2015, some documents and information responsive to items (1), (2), (3), (7) and (8) of the Appointment Letter.

15. On or about July 9, 2015, Keith called Williams by telephone and requested payroll records for FCI, in accordance with item (5) of the Appointment Letter. Williams denied that FCI had any payroll records.

16. On or about July 14, 2015, Keith and WHD Investigator Hector Funes ("Funes") conducted interviews with workers at the FCI Marsha Brook Circle worksite at 2475 West 5520 South, Taylorsville, Utah.

17. On or about July 15, 2015, Williams met with workers at the FCI Marsha Brook Circle worksite at 2475 West 5520 South, Taylorsville, Utah. These workers included Jack Erickson, Gary Troy Denter, Justin Malin, Exequiel Magana, and Antonio Villa.

18. At this July 15, 2015 meeting, Williams expressed his desire that the workers not talk with the WHD investigators.

19. At this July 15, 2015 meeting, Williams informed the workers that FCI would no longer provide the workers with copies of pay stubs.

20. At this July 15, 2015 meeting, Williams asked the workers to sign subcontractor agreements with FCI.

21. Defendants admit that their actions on July 15, 2015 impeded the Section 11(a) investigation being conducted by Plaintiff.

22. On or about August 7, 2015, Keith made an additional request by email to FCI for ten (10) categories of documents.

23. On or about August 25, 2015, WHD issued a subpoena duces tecum to FCI for 13 categories of documents. These 13 categories included, but were not limited to, the ten (10) categories of documents listed in Keith's August 7, 2015 email request to FCI.

24. On or about August 26, 2015, FCI provided to Keith via email some additional documents and information responsive to Keith's August 7, 2015 email request. FCI did not provide payroll and/or time cards recorded for all who worked for FCI since July 2013. FCI

provided a list of payments made by FCI (but not its related business entities) to individuals that FCI identified as subcontractors, for the period from July 2013 to July 2015.

25. On or about September 9, 2015, FCI provided to WHD, via U.S. mail, some additional documents and information responsive to the August 25, 2015 subpoena duces tecum.

26. On or about September 11, 2015, Plaintiff filed its Complaint herein.

27. On or about September 11, 2015, Plaintiff filed his Notice and Motion for a Temporary Restraining Order and Order for Defendants to Show Cause Why a Preliminary Injunction Should Not Issue.

28. Defendants, through their attorney, accepted service of the Complaint and Motion for a Temporary Restraining Order and Order for Defendants to Show Cause Why a Preliminary Injunction Should Not Issue on or about September 14, 2015.

29. Plaintiff filed proof of service on September 15, 2015.

30. Shortly after the foregoing filings, Defendants agreed to the terms of a preliminary injunction and the parties filed a joint motion for preliminary injunction on or about September 22, 2015.

31. On or about September 22, 2015, the Court entered a Preliminary Injunction against FCI and Williams.

32. At all times relevant to this proceeding, Williams and his business partners were not licensed by the Utah Department of Occupational and Professional Licensing ("DOPL") to perform construction work.

33. At all times relevant to this proceeding, FCI and its related business entities were not licensed by DOPL to perform construction work.

34. Documents Bates-stamped as FC000036-FC000041 are true and authentic copies of pay records for Mychal Scott Barber.

35. Documents Bates-stamped as FC000042-FC000050 are true and authentic copies of pay records for Mychal Barber.

36. FCI or its related business entities pay for the materials used on their worksites. Workers may purchase materials at Home Depot, but FCI must approve these purchases, which are made on FCI's commercial account.

37. Williams and/or his business partners make the determination of which workers report to which worksites for which projects.

38. Williams, his business partner David Garcia, or Erickson directed the Barbers to report to a particular worksite for a particular project.

ADDITIONAL FINDINGS OF FACT

39. Magana revealed he taped July 15, 2015 meeting to Williams about six months after taping. Tr. 272

40. After revealing taping given three weeks off to work for competitor and afterwords back to FCI and received a raise. Tr. 273.

41. Never fired Barbers. Tr. 1050

42. Red tags caused work stoppage and blamed on Mychal Barber. Tr. 1050-1053

43. Because of red tags told Mychal Barber could not use him. Tr. 1053:16-23

44. Told Jack Erickson not to use Mychal Barber. Tr. 1056

CONCLUSIONS OF LAW

This matter came before the court for a Bench Trial beginning on January 9, 2017 and ending on January 17, 2017. On August 8, 2016, the court held a hearing on the motion. At trial, Defendants were represented by David E. Ross II, and Plaintiff was represented by Courtney Przybylski. The court has carefully considered the materials submitted by the parties, as well as the facts and law relevant to the matters complained of. Now being fully advised, the court issues the following Memorandum Decision and Judgment.

BACKGROUND

Plaintiff Thomas E. Perez, the Secretary of Labor for the United States Department of Labor, brought this action against Defendants under the Fair Labor Standards Act (FLSA"), alleging ongoing violations of Sections 11(a) and 15(a)(3). Section 11(a) of the FLSA empowers the Secretary to investigate employment practices to determine whether any person has violated any provision of the FLSA. Section 15(a)(3) of the FLSA provides that it is unlawful for any person to discharge or discriminate against any employee because the employee has filed a complaint or instituted proceedings under the FLSA.

With respect to the alleged Section 11(a) violation, Plaintiff alleges that Defendants did not turn over relevant wage and hour records when requested, later provided false documents with false dates and signatures, altered and/or destroyed payroll and time records, rebuked employees for providing any information to investigators, tried to get employees to provide them with the questions being asked so they could coordinate with an attorney, threatened to report employees to the IRS, presented employees with undated independent contractor agreements and told them to lie about when the agreement was signed, and terminated the employment of the two workers Defendants believed had made a wage and hour complaint.

Plaintiff also alleges that Defendants violated Section 15(a)(3) of the FLSA by terminating two employees based on the belief that they made a wage and hour complaint with the Utah Labor Commission and by threatening employees with IRS scrutiny for cooperating with investigators. Plaintiff contends that Defendants directed Mychal Barber and Mychal Scott Barber not to report to work on July 8, 2015, refused to allow them to return to work the next week, and refused to pay them their last paycheck for hours worked after July 1, 2015.

Defendant FCI, located in Taylorsville, Utah, acquires distressed properties and properties facing foreclosure in Utah and then fixes them up for resale or leasing. Defendant Jason Williams owns and operates FCI. FCI acquires properties in Utah and purchases all of its materials in Utah. FCI claims that its workers use their own tools. Plaintiff disputes this, claiming that Jason Williams testified in his deposition that FCI provides vacuum cleaners, rakes, and shovels to workers at job sites.

The Court makes the following conclusions of law:

FIRST CAUSE OF ACTION (Obstructing the Secretary's Investigation in Violation of the FLSA)

The Secretary's Section 11(a) of the FLSA "Investigation" began July 8, 2015. Williams conducted a meeting of about five of the workers on July 15, 2015. Defendants have admitted that a purpose of the meeting was to impede the Investigation. The Court heard a tape of the July 15, 2015 meeting and concludes that it in part demonstrated an intention on the part of Williams to obstruct the Investigation. The Secretary called as witnesses to the meeting two of the workers who were in attendance, namely Jack Erickson and Exequiel Magana. The witnesses did not recall matters relating to the IRS or independent contractor agreements. Although the testimony was not helpful, the admission and the tape convinced this Court to conclude that FCI did obstruct the Investigation in July 2015.

The Complaint in this matter was filed on September 11, 2015, accompanied by a motion for a TRO and preliminary injunction. FCI acknowledging their past obstruction and failure to provide all requested records, stipulated to the entry of a preliminary injunction and agreed to cooperate with the Investigation. This Court upon a stipulated motion, entered the Preliminary Injunction on September 22, 2015.

Since the Preliminary Injunction was entered in September 2017 through at least the date of trial, a period exceeding 15 months, there is no evidence that FCI failed to comply with the injunction. The Secretary claims that pursuant to ¶6 of the Preliminary Injunction, FCI was required to provide a written notice to the Secretary at least 10 days prior to terminating any employee or worker for any reason and FCI failed to provide this notice prior to terminating

Exequiel Magana in September 2016. The Secretary also argued that the termination of Mr. Magana was in retaliation of his telling Williams in May 2016 that he was the person who taped the July 15, 2015 meeting between Williams and five workers. These claims fail. The Secretary called Exequiel Magana to testify in support of these contentions. Mr. Magana's testimony did not support his being terminated by FCI and he made no claim of retaliation. In fact as to the retaliation claim based upon his telling Williams that he made the tape, Mr. Magana testified that he told Williams about his taping the July 15, 2015 meeting at a meeting with Williams in May 2016 and that in the same meeting he requested three weeks off in order to work for a competitor and the requested was granted. That Mr. Magana after returning to work at FCI in June 2016, was offered a substantial increase in his hourly rate, although conditioned upon his signing an independent contractor agreement. Mr. Magana enjoyed the increase in pay for a few months even though he had not signed the agreement. When later asked when he was going to sign, he stated he did not want to sign and at such meeting with Williams and Garcia, he was informed that his hourly rate would revert to his prior hourly rate. The meeting ended and Mr. Magana left the FCI offices. Williams and Garcia testified that Mr. Magana was not terminated and Williams expressed his deep concern for his former worker of many years. These facts did not establish by a preponderance of the evidence that FCI violated the Preliminary Injunction or that there is a likelihood FCI will in the future violate the FLSA.

The 10th Circuit Court of Appeals in *Mitchell, Secretary of the U.S. Department of Labor v. A.R. Hertzke*, 234 F.2d 183, 185 (10th Cir. 1956) stated that "The purpose of an injunction in a case of this kind is to prevent future violations in the public interest, not to punish for past transgressions. Equity will not do a useless or vain thing, and in the absence of some likelihood or probability that the violations will recur, the court is fully justified in refraining from entering an empty decree." See *United States v. W. T. Grant Co.*, supra.' [5]. The U.S. Supreme Court in *Walling v. Youngerman-Reynolds Hardwood* Co., 325 U.S. 419, 65 S. Ct. 1242, 1243, 89 L. Ede. 17075, stated, "While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling v. Helmerich & Payne Inc.,* 323 U.S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a *bona fide* intention to comply with the law and not to resume the wrongful acts." *Cf. United States v. United States Steel Corp.*, 251 U.S. 417, 445. Keeping in mind that a preliminary injunction has been in place for well over a year and FCI has complied with the injunction and there has not been any evidence presented indicating FCI will in the future violate the FLSA that would justify issuing a permanent injunction, this Court is not inclined to do so.

SECOND CAUSE OF ACTION (Retaliation against employees in violation of the FLSA)

Excluding the alleged retaliation against the Barbers, which is covered under the Third Cause of Action below, this Cause of Action emanates primarily out of the facts and circumstances that occurred at the July 15, 2015 meeting between Williams and five workers at a FCI work site. Williams admitted he was wrong in requesting the workers to not cooperate with the Secretary's Investigation, which resulted in stipulating to a preliminary injunction and an agreement to cooperate with the Investigation. The Secretary called two witnesses to in part demonstrate the long-term impact on the workers that was set in motion by the July 15, 2015 meeting. Both Jack Erickson and Exequiel Magana testified that the meeting did not cause them concern for any reprisal or other negative consequences.

The decision to not permanently enjoin FCI is the same as it was for the First Cause of Action. There is no evidence to demonstrate a need for a permanent injunction.

THIRD CAUSE OF ACTION (Retaliation against Mychal Barber and Mychal Barber in Violation of the FLSA)

The Secretary proceeded with a claim that he established a prima facie case of retaliation as it relates to the Barbers. This Court set forth the elements necessary for a retaliation prima facie case in *Johnston v. Davis Security, Inc.*, 217 F. Supp 2.d 1224, 1228 (D.Utah 2002). "To establish a prima facie case of retaliation under the FLSA, Plaintiff must show that (1) he or she engaged in activity protected by the FLSA; (2) he or she suffered adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection existed between the employee's activity and the employer's adverse action." citing, *Conner v. Schnuck Markets, Inc.,* 121 F.3d 1390, 1394 (10th Cir.1997). In this case the Barbers by filing a complaint under the FLSA met the first prong, a protected activity, as Section 15(a)(3) specifically refers to the discharge against an employee because such employee filed a complaint related to the FLSA. The second prong necessitates that the Barbers were employees of FCI and although FCI argues that the Barbers were not employees, the Court will assume at this juncture of the analysis that the Barbers were employees. The termination of the relationship or employment with FCI was an adverse event. It also requires that this adverse event occurred after or contemporaneous with the adverse event. FCI states that the Barbers were told that FCI did not have any more work for them before the Barbers filed their complaint. And the third prong requires that there be a causal connection between the employer activity and the adverse action. The Court in *Conner v. Schnuck Markets, Inc.,* 121 F.3d at 1394, *id*. Stated, "We have held that '[t]he causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.' *Burrus v. United Tel. Co. of Kan., Inc.,* 683 F.2d 339, 343 (10th Cir.1982) (citing *Grant v. Bethlehem Steel Corp.,* 622 F.2d 43, 46 (2d Cir.1980); *Womack v. Munson,* 619 F.2d 1292, 1296

& n. 6. In this case the Barbers were told not to return to work July 8, 2015, a day after the protected activity of filing the FLSA complaints and allegedly a week later were again told not to return. *Conner v. Schnuck Markets, Inc.,* court at 1394, "In analyzing FLSA retaliation claims, we apply the shifting burden of proof scheme initially articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36L.Ed.2d 668 (1973). *Richmond v. Oneok, Inc.,* 120 F.3d205, 208 (10th Cir.1997) (citing *Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1323 (10th Cir.1997)). Under this standard, a plaintiff must first establish a prima facie case of retaliation. *Id.* The burden then shifts to the employer to offer a legitimate reason for the plaintiff's termination. *Id.* Once the employer offers such a reason, 'the burden then shifts back to the plaintiff to show that 'there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual.' " *Id.* (quoting *Morgan,* 108 F.3d at 1323). Although it may be debatable as to the Secretary establishing a prima facie case based upon the foregoing, much like the *Conner v Schmuck Markets* court did, the Court will move to the next step in the analysis.[1] FCI produced evidence at trial that because Mychal Barber likely caused work stoppage by responsible for two different cities "red tagging" two FCI construction projects, Williams told Mychal Barber it did not have any more work for him and ceased assigning him work sites and projects by the end of June 2015. After which Mychal Barber took it upon himself to perform some work at FCI work sites without authorization and filed claims for hours worked that were about 5 times the amount of time the Barbers actually worked. Based upon this Williams instructed Jack Erickson to call Mychal Barber and tell him not to show up for work. Jack Erickson made this call the morning of July 8, 2015.

[1]Whether there are sufficient other circumstances to sustain Conner's burden of proving the causation element of his prima facie case we need not decide because the district court opinion can be affirmed on the basis of its holding at the next stage of the *McDonnell Douglas* analysis that Conner failed to rebut Schnuck's evidence of a non-retaliatory reason for terminating him. Thus, we turn to that step in the analysis. *Conner v. Schnuck Markets, Inc.,* court at 1395.

Thus, the burden shifted to the Secretary to show that this was pretextual.[2] The Secretary produced two tapes of conversations, one was a conversation between the Barbers and Jack Erickson and the other between Williams and Mychal Barber. The Erickson tape was actually consistent with the reasoning for the termination and the Williams tape did not establish by itself that the FCI reason for termination was pretextual. As such the Secretary did not prove by a preponderance of the evidence that the FCI reason for termination was pretextual and the relief sought under Section 216 of the FLSA is denied.

CONCLUSION

There was no reason to address the issues of jurisdiction and whether or not the Barbers were employees as there is no need for an injunction under the FLSA and there was no retaliation against the Barbers.

Based upon the above reasoning the claims of the Secretary against the Defendants are hereby dismissed and Judgment granted in favor of the Defendants.

/S/ David E. Ross II
Attorney for Defendants

[2][i]f a prima facie case is established, then the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. The defendant need not prove the absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason. If evidence of a legitimate reason is produced, the plaintiff may still prevail if [he] demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be delivered a true and accurate copy of the foregoing Defendants' Closing Arguments, Proposed Findings of Fact and Conclusions of Law to the following by electronic means this 12th day of April 2017:

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